

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Engineering Division
Honolulu, Hawaii 96813

February 22, 2008

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Request that the Board Grant in Part and Deny in Part Request for Contested Case Hearing by Pflueger Properties as to Authorization for Department and its agents, employees, and consultants, to Enter upon various private Properties and Easements / Right-of-ways for the purpose of conducting investigations and inspections of the Kaloko Dam, as Directed by Act 118, SLH 2006, Relating to Emergency Relief for Natural Disasters, and Pursuant to Hawaii Revised Statutes Chapter 179D.

At the Board of Land and Natural Resource's meeting of January 25, 2008, the Board approved the request to enforce the Board's and Department's rights as stated in Chapter 179D, to among other things, enter upon private property for the purposes of conducting surveys and investigations, in this case a phase II investigation of Kaloko dam and reservoir.

Subsequent to the approval, a petition for a contested case hearing was faxed and later mailed to the Department, by William C. McCorriston on behalf of Pflueger Properties. A copy of the petition and an amended petition are attached.

Upon the advice of the Department of Attorney General, the Department is requesting that the petition be granted in part and denied in part as follows: granted insofar as the petition requests a contested case as to whether Ka Loko dam is a dam within the meaning of chapter 179D; denied in all other respects.

Staff notes that there is an issue as to petitioner's standing. Staff is not aware that petitioner has any ownership of the subject property.

RECOMMENDATION:

That the Board of Land and Natural Resources:

1. Grant the petition in part and deny it in part as follows (subject to further proceedings as to standing): grant insofar as the petition requests a contested case as to whether Ka Loko dam is a dam within the meaning of chapter 179D; deny in all other respects.

Respectfully submitted,



ERIC T. HIRANO
Chief Engineer

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN, Chairperson

ITEM L-1

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Attorneys for PETITIONER
 PFLUEGER PROPERTIES

BEFORE THE
 STATE OF HAWAII
 BOARD OF LAND AND NATURAL RESOURCES

| | |
|----------------------------------|--|
| IN THE MATTER OF: |) |
| |) AMENDED PETITION FOR A |
| REQUEST FOR AUTHORIZATION FOR |) CONTESTED CASE HEARING |
| THE DEPARTMENT AND ITS AGENTS, |) SUBMITTED ON JANUARY 25, 2008; |
| EMPLOYEES, AND CONSULTANTS, TO |) EXHIBIT "A" |
| ENTER UPON VARIOUS PRIVATE |) |
| PROPERTIES AND EASMENTS / RIGHT- |) Date of Public Hearing/Board Meeting: |
| OF-WAYS, FOR THE PURPOSE OF |) January 25, 2008. |
| CONDUCTING INVESTIGATIONS AND |) |
| INSPECTIONS OF THE KA LOKO DAM, |) Legal Authority Under Which Hearing, |
| AS DIRECTED BY ACT 118, SESSION |) Proceeding or Action is Being Made: |
| LAWS OF HAWAII 2006, RELATING TO |) Hawai'i Revised Statutes Chapters 91 and |
| EMERGENCY RELIEF FOR NATURAL |) 179D. |
| DISASTERS, AND PURSUANT TO |) |
| HAWAII REVISED STATUTES CHAPTER |) |
| 179D. |) |

AMENDED PETITION FOR A CONTESTED
CASE HEARING SUBMITTED ON JANUARY 25, 2008

Comes now, Pflueger Properties ("Petitioner"), by and through its attorneys, McCorriston
 Miller Mukai MacKinnon LLP, and hereby submits this Amended Petition for a Contested Case

Hearing submitted on January 25, 2008 ("Petition", see attached Exhibit "A"), pursuant to Hawai'i Administrative Rules § 13-1-29.

I. STATEMENT OF THE NATURE OF PETITIONER'S INTEREST

Petitioner is the owner of part of the property on which the Ka Loko reservoir was located, tax map key: TMK-5-1-02:1.

II. SPECIFIC DISAGREEMENT, DENIAL OR GRIEVANCE WITH THE ABOVE MATTER

Petitioner requests reconsideration of the approval, on January 25, 2008, of the Request for Authorization for the Department and its Agents, Employees, and Consultants, to Enter Upon Various Private properties and Easements / Right-of-Ways, for the Purpose of Conducting Investigations and Inspections of the Ka Loko Dam, as Directed by Act 118, Session Laws of Hawaii 2006, Relating to Emergency Relief for Natural Disasters, and Pursuant to Hawai'i Revised Statutes Chapter 179D. Petitioner made both an oral and written request for a contested case hearing on January 25, 2008 when the matter was discussed before the Board of Land and Natural Resources ("BLNR"), pursuant to Hawai'i Administrative Rules § 13-1-29. Petitioner further amends the Petition for Contested Case Hearing submitted on January 25, 2008 with this amended petition, as authorized by Hawai'i Administrative Rules § 13-1-29.

III. OUTLINE OF BASIC FACTS

The events relevant to the Petition occurred as a result of record rainfall in March of 2006. The Governor of the State of Hawai'i issued an Emergency Proclamation on March 2, 2006, as amended by supplementary proclamations 1 through 7, in response to the rainfall, flooding, and health, safety, and welfare needs of the people of Hawai'i. In support of these proclamations, the State Legislature passed Act 118, Session Laws of Hawai'i 2006 (amended by Act 89, Session Laws of Hawai'i 2007) to appropriate funding to, among other things, "hire

consultants to conduct surveys, studies, and assessments of private and government-owned dams and reservoirs statewide to determine their current physical integrity." In accordance with Act 118, the State of Hawai'i Department of Land and Natural Resources ("DLNR") conducted a Phase I or visual dam safety investigation in cooperation with the Army Corps of Engineers for numerous dams located across the state—including an investigation involving the subject Ka Loko property on which the Ka Loko Dam failed on March 14, 2006. DLNR now requests approval to conduct a Phase II investigation of the Ka Loko property *alone* for the purpose of an in-depth study that involves much more invasive, burdensome, and inconvenient discovery methods (topographic mapping, hydraulic mapping, soil borings, etc.) than the prior Phase I investigation. Furthermore, DLNR has scheduled the Phase II inspection during the litigation of several civil actions in which the State of Hawai'i is a party, and prior to any decision by the State of Hawai'i Attorney General on whether criminal charges may be brought in relation to the failure of the Ka Loko Dam. Lastly, DLNR has suggested that it may attempt to collect from the landowner the expense of conducting and preparing the Phase II investigation.

IV. OUTLINE OF SPECIFIC ISSUES TO BE RAISED

A. Lack of Jurisdiction

DLNR has not established whether the target of the requested investigations and inspections meets the statutory definition of a "dam"; thus, DLNR has not established a jurisdictional basis for such request. Haw. Rev. Stat. §179D-3.

B. Infringement of Due Process and Equal Protection Rights

Because DLNR has not established whether a dam is present on the subject site, and DLNR has chosen the Ka Loko property alone for investigation, the DLNR's decision to permit the proposed investigations and inspections lacks a rational basis and is an unconstitutional

infringement of Petitioner's Due Process and Equal Protection Rights. U.S. Const. amend. XIV § 1, Haw. Const. art. I, § 5.

C. Infringement of Property Rights

The DLNR's proposed investigations and inspections will be an unconstitutional infringement of petitioner's property rights. U.S. Const. amend. V, XIV § 1; Haw. Const. art. I, § 2.

D. Violation of a Right to a Fair Trial

Approval of the subject DLNR inspection and potential public dissemination of findings, despite ongoing and/or potential civil and criminal investigation, would prejudice Petitioner's right to a fair trial. U.S. Const. amend. V, U.S. Const. amend. XIV § 1, Haw. Const. art. I, § 8.

E. Violation of Right to a Reasonable Search and Seizure

Approval of the subject DLNR inspection coupled with approval of soils testing, sampling, and/or boring, is a violation of Petitioner's right to a reasonable search and seizure without any guarantee that the inspection, testing and results would not be used in a criminal proceeding. U.S. Const. amend. IV, XIV § 1; Haw. Const. art. I, § 8.

V. RELIEF OR REMEDY TO WHICH PETITIONER IS ENTITLED

Petitioner respectfully requests a contested case hearing to address the issues listed above. Lastly, Petitioner reserves the right to submit further motions or submittals in support of the request above, pursuant to Hawai'i Revised Statutes Chapter 91.

Dated: Honolulu, Hawai'i, February 4, 2008.



WILLIAM C. MCCORRISTON
DAVID J. MINKIN
MASON M. YAMAKI

Attorneys for Petitioner
PFLUEGER PROPERTIES

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

1. Name William C. McCorniston on behalf of Pflueger Properties Phone 529-7300 Fax 535-8841 JAN 25 2008
2. Address P.O. Box 2800 Honolulu, HI 96803
Email Address mccorniston@m4law.com
3. Attorney (if any) see above Phone see above Fax see above
4. Address see above
Email Address see above
5. Subject Matter: Request for authorization... for the purposes of conducting investigations and inspection of Kaloa.
6. Date of Public Hearing/Board Meeting JANUARY 25, 2008 (1/25/08)
7. Legal authority under which hearing, proceeding or action is being made H.R.S. Chapter 179D
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: Property owner of TMK-5-1-02:1 (Kaloa)
9. The specific disagreement, denial or grievance with the above matter: Request denial of authorization for inspection and investigation of Kaloa Properties
10. Outline of specific issues to be raised: Jurisdictional basis not present; unconstitutional and illegal circumvention of civil and criminal rights with regard to investigation and inspection.
11. Outline of basic facts: Refer to Eric T. Hirano letter to State of Hawaii Dept. of Land and Natural Resources, dated January 25, 2008 requesting subject authorization
12. The relief or remedy to which you seek or deem yourself entitled: denial of subject authorization.
- ma Reserves the right to amend and supplement petition w/in 10 days. HAK 5 13-1-29
(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: January 25, 2008